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REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (1994)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-ninth session prepared by the Secretariat

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INTRODUCTION

1. At its forty-ninth session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 23 September 1994, to include in the agenda of the session the item entitled "Report of the International Law Commission on the work of its forty-sixth session" 1/ (item 137) and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 16th to 28th meetings and at its 40th and 41st meetings, held from 24 October to 4 November and on 25 and 29 November 1994. 2/ At the 16th meeting, on 24 October, the Chairman of the Commission at its forty-sixth session, Mr. Vladlen Vereshchetin, introduced the report of the Commission. At its 41st meeting, on 29 November, the Sixth Committee adopted draft resolution A/C.6/49/L.22, entitled "Report of the International Law Commission on the work of its forty-sixth session", draft resolution A/C.6/49/L.27/Rev.1, entitled "Draft articles on the law of the non-navigational uses of international watercourses", and draft resolution A/C.6/49/L.24, entitled "Establishment of an international criminal court". The draft resolutions were adopted by the General Assembly at its 84th plenary meeting, on 9 December 1994, as resolutions 49/51, 49/52 and 49/53.

3. By paragraph 12 of resolution 49/51, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the Commission's report at the forty-ninth session of the General Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

4. The document opens with a section A entitled "General comments on the work of the International Law Commission". Section A is followed by five sections (B to F), corresponding to chapters II to VI of the report of the Commission.

TOPICAL SUMMARY

A. General comments on the work of the International Law Commission

5. The Commission was generally praised for its productivity and for the substantial progress it had made with respect to the items on its agenda. Its efforts at the codification and progressive development of international law were viewed as serving the purpose for which it had been established by the General Assembly in its resolution 174 (II) of 21 November 1947, inasmuch as ensuring the primacy of law was the principal guarantee of international peace, security and cooperation.

1/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10).

2/ Ibid., Sixth Committee, 16th to 28th and 40th and 41st meetings.

6. A number of delegations noted with satisfaction that, in addition to other valuable contributions, the Commission's report contained two final drafts on topics of major importance to many countries and that those drafts had been completed on schedule and with the Commission's usual high standard.

7. Tribute was paid to the Chairman of the Commission at its forty-sixth session, to the Special Rapporteurs and to the Chairman of the Working Group on a Draft Statute for an International Criminal Court, as well as to the Secretariat staff for the high level of their contribution and for their dedication and professionalism, and appreciation was expressed to all concerned for the quality of the report which invigorated the Sixth Committee's work each year.

B. Draft Code of Crimes against the Peace and Security of Mankind

1. Second reading of the draft Code provisionally adopted in 1991 3/

(a) General remarks

8. Several delegations expressed satisfaction with the resumption of the work on the topic at the Commission's forty-sixth session and with the progress achieved during the session, which had made it possible to refer 15 articles to the Drafting Committee. The Commission's decision to endeavour to complete the second reading of the draft by 1996 was noted with appreciation.

9. Particular importance was attributed to continuing efforts to codify the substantive law that would fall within the jurisdiction of the court envisaged in the draft statute. The view was expressed that progress on the draft Code was indispensable for the eventual establishment of an international criminal justice system. It was also suggested that recent events in Liberia, Rwanda, Somalia and the former Yugoslavia had demonstrated the relevance of the future Code as an ideal instrument for the prevention and suppression of acts which endangered civilization.

10. Several representatives suggested that the Commission should give priority to completing a generally acceptable draft and devote a substantial amount of time to the topic at its forthcoming session. The view was expressed that the creation of ad hoc tribunals for the former Yugoslavia and for Rwanda had confirmed the urgent need to complete the draft Code and that the same degree of urgency as had been attached to the recently completed draft statute should be attached to the draft Code. Regret was expressed at the delay in completing the project, which had been on the Commission's agenda since the 1940s. The Commission was urged to intensify its work on the draft Code so that the international criminal court would have at its disposal a legal framework containing definitions of the relevant crimes. The completion and adoption of

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3/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), chap. IV.

the draft Code would, it was stated, strengthen and enhance the effectiveness of the proposed court and contribute substantially to the advancement of work on the statute for the court.

11. A number of representatives paid tribute to the Special Rapporteur for the quality of the work submitted. The concrete proposals made in relation to the general part of the draft Code on the basis of the written comments of various countries were described as to the point and reasonable. While confidence was expressed in the ability of the Special Rapporteur to eliminate unnecessary provisions, the Commission was cautioned against making major changes in the draft adopted on first reading.

12. At the same time, some delegations expressed reservations on questions of principle as well as drafting, and others viewed the draft Code as unsatisfactory, notwithstanding the new developments relating to it.

13. It was pointed out that a number of questions still needed to be resolved, namely: (i) Should the Code be restricted to a limited number of crimes? (ii) Should its title refer only to crimes against "the peace and security of mankind"? (iii) Should the Code be confined to crimes committed by individuals, or should it deal with State conduct? (iv) Should it be implemented through national legal systems, or through an international mechanism? In the latter event, how should penalties be prescribed and sentences carried out? (v) What should be the relationship between the proposed international court and the Code? (vi) What should be the status of the Code in the internal law of the States parties to the statute of the proposed court? (vii) Should there be a provision on settlement of disputes in the convention containing the Code?

14. Questions (i) and (v) gave rise to some general comments, as follows.

15. As regards question (i) relating to the scope of the draft Code, attention was drawn to paragraph (4) of the commentary to article 20 of the draft statute indicating that the Code was not intended to deal with crimes under general international law, as this would require a "substantial legislative effort". The remark was made in this connection that, while the draft Code was not an unreservedly acceptable idea, this legislative effort was both possible and necessary and the Commission should rise to the challenge and provide the substantive law needed for the proper functioning of an international criminal jurisdiction.

16. The view was expressed that the Code should be comprehensive and encompass well-understood and legally defined crimes so as to ensure the widest possible acceptability and effectiveness. The Special Rapporteur's intention to limit the list of crimes contained in the draft Code to violations generally agreed to constitute crimes against the peace and security of mankind or whose characterization as such was hard to challenge was noted with satisfaction. It was suggested that, even if the Code were not as comprehensive as some might wish, it should incorporate those categories of conduct around which the greatest consensus among States could be built to provide effective deterrence against the commission of those crimes, while leaving other categories of conduct unaffected by international law. Emphasis was placed on the need to

define the different categories of the most serious crimes and related penalties to ensure observance of the principle nullum crimen nulla poena sine lege.

17. As regards question (v), namely, the relationship between the proposed international criminal court and the Code, some representatives took the view that the draft statute for an international criminal court (procedural law) was closely linked to the prior adoption of a draft code (substantive law) clearly defining the crimes which would be brought before the court. The two instruments, it was stated, were indissociable and complementary in that they would enable the international community to prosecute those who committed crimes against the peace and security of mankind and ensure respect for the principle nullum crimen nulla poena sine lege. Regret was expressed that people tended to deal with the issue of the court as though it were a separate issue and to relegate the issue of the Code to the second place. Attention was also drawn to the fact that the idea of establishing an international criminal jurisdiction had been prompted by the need for a judicial organ that would apply the Code so that the issue of the court was simply a sub-item of the overall issue of the elaboration of the draft Code, as was clearly demonstrated by the past history of the issue, and the General Assembly was cautioned against rushing into adopting the statute of a court without first defining the applicable law.

18. Other representatives, while recognizing that the two instruments were closely linked, felt that the court could be established independently without awaiting finalization of the draft Code to avoid delay. It was suggested that, once adopted, the draft Code should be brought within the jurisdiction of the court through incorporation in the list of treaties contained in the annex to the draft statute.

19. Still other representatives questioned the appropriateness of establishing a link between the two instruments to ensure the proper functioning of the court, bearing in mind that the prospects of agreement on a draft code were, in their opinion, doubtful. The view was expressed that it would not be wise to insist on linking the two instruments in the absence of consensus on the draft Code inasmuch as bringing within the court's jurisdiction the crimes provided for in the Code would raise a number of additional concerns regarding the draft statute. However, it was observed that the prospects for the negotiation of a generally acceptable draft Code had been improved by the transfer of many of its jurisdictional and procedural aspects to the draft statute.

20. Several delegations insisted on the need to ensure that the provisions of the draft Code were consistent with those of the draft statute. Such coordination was described as essential because both instruments contained provisions dealing with the same subject-matter. The Commission's decision to establish a special mechanism to ensure the required degree of harmonization was therefore noted with satisfaction and it was suggested that the Special Rapporteur for the draft Code of Crimes against the Peace and Security of Mankind should participate in the further consideration of the draft statute.

(b) Comments on specific articles

21. The general definition contained in article 1 was considered to be of limited usefulness. It was suggested that categories of conduct such as crimes against humanity should be encompassed in the definition. It was also suggested that the phrase "under international law" should be deleted or that the point should be covered in the commentary.

22. While the view was expressed that a simple list of crimes without definitions would suffice, a number of representatives found it preferable to combine a general or conceptual definition with an enumerative one specifically referring to the crimes defined in the Code. It was felt that this approach would provide a flexible definitional framework and could accommodate future developments and suggestions. Merit was found in adopting a general formulation followed by an indicative, non-limitative enumeration setting forth the relevant criteria for drawing up the list of crimes.

23. As regards article 2, the view was expressed that the Code should not project any conflict between the characterization of a form of conduct as a crime under the Code and the characterization of the same conduct as a crime under national or international law, particularly since most of the crimes to be covered by the Code were also crimes under national law or would be once a State adopted the Code. It was suggested that the first sentence of the article should be reformulated to recognize the link between the draft Code and the criminal codes of States.

24. There was a proposal to delete the second sentence of the article. Another proposal was to reformulate the provision as follows: "The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that the act or omission in question is not a crime under internal law does not exonerate the accused."

25. The remark was made that, although State practice and the various crime suppression conventions provided considerable support for the principles of responsibility and punishment reflected in article 3, concepts like "attempt" involved complex legal and technical questions that required further study.

26. Under one approach, the concept of "attempt" should not be defined in the Code and should rather be addressed by the Commission in specific cases based on generally recognized practice. Under another approach, the application of the concept of "attempt" should be left to the competent court. In this regard, the following reformulation was proposed: "An individual who attempts to commit one of the crimes set out in this Code is responsible therefor and is liable to punishment." In explanation of this proposal, it was said that the term "attempt" meant an act or omission towards the commission of a crime set out in the Code which, if not interrupted or frustrated, would have resulted in the commission of the actual crime.

27. There was substantial support for the deletion, as suggested by the Special Rapporteur, of article 4 which was described as too general and of dubious usefulness and as a bone of contention between those who viewed it as interference with the rights of the defence and those who considered it

important, especially in connection with a political offence. It was suggested that the contents of the provision should be included in the article on extenuating circumstances.

28. The proposed deletion was, on the other hand, considered objectionable inasmuch as it was deemed important to prevent the perpetrators of crimes from arguing that they had acted for political reasons and should therefore be immune from punishment. With reference to the distinction between "motive" and "intent", it was suggested that motive could not extend to racism or national hatred, which were not generally cited as exceptions in any similar instrument, and that if the article made room for such extraneous considerations, it would be unacceptable. As regards the distinction between "motive" and "extenuating circumstances", the view was expressed that extenuating circumstances could not be a reason not to treat a particular act as a crime, though they might be considerations for lessening punishment once a crime had been established. It was suggested that the scope and conditions under which "exceptions", "motives" and "extenuating circumstances" could be pleaded required further clarification.

29. The remark was made that article 5, while limiting criminal responsibility to individuals, did not rule out the responsibility of the State and should be read in conjunction with other international instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide. Several representatives favoured the retention of the text inasmuch as, in their view, a State should be held internationally liable for damage caused by its agents as a result of a criminal act committed by them. It was remarked in this context that the State was responsible only for acts committed by persons connected to it by undeniable links of subordination. At the same time it was pointed out that criminal responsibility was personal and individual, and inconceivable with respect to the State as a moral person not subject to penal measures.

30. As regards the obligation to try or extradite provided for in article 6, the view was expressed that the provision dealing with simultaneous requests from different States for extradition should not be drafted in a mandatory manner as far as the priority to be given to the principle of territorial jurisdiction was concerned. It was accordingly suggested that in paragraph 2 the word "shall" be replaced by "may".

31. With respect to paragraph 3, it was observed that the establishment of an international criminal court offered an ideal solution to the problem of positive or negative conflicts of jurisdiction and guaranteed the inevitability of punishment for persons committing crimes against humanity. On the other hand, it was suggested that the paragraph be redrafted to make it clear that the obligation to try or extradite did not prejudge or prejudice the jurisdiction of any international criminal court as and when it was established, since no final decision had yet been taken in that regard.

32. For the purpose of harmonization with the draft statute of an international criminal court, the suggestion was made to make paragraphs 1 and 2 of article 6 of the draft Code subject to article 53 of the draft statute and to delete paragraph 3 or, alternatively, to amend paragraph 3 so as to include therein the essence of article 53 of the draft statute.

33. It was observed that, instead of deleting article 7 - which would be contrary to the letter and spirit of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity - it would be better to confine its scope to "war crimes" and "crimes against humanity" since, in the absence of such a provision, States might apply different norms regarding statutory limitations, which would weaken the international system.

34. According to another approach, article 7, while it embodied a principle designed to ensure the punishment of the perpetrators of the crimes covered by the Code, might be a bar to amnesty and national reconciliation, and its absoluteness might have drawbacks. It was also observed that, for practical reasons relating to prosecution and the need for sound administration of justice, there must be solid grounds for any decision to make statutory limitations non-applicable in certain cases. Support was therefore expressed for the view that some flexibility should be provided with regard to the length of time after which statutory limitations should apply and that States should be allowed to adopt amnesty measures when to do so would advance national reconciliation.

35. It was also said that the essential aim of drafting the Code and establishing a permanent international criminal court was deterrence and the preservation of peace and security, and that providing for withdrawal of prosecution in the interests of security would be consistent with that aim.

36. There was a suggestion to reconsider the question of the non-applicability of statutory limitations at a later stage when all the provisions of the draft Code were known.

37. As regards judicial guarantees, the view was expressed that article 8, which represented the bare minimum, should include the full range of generally recognized principles, arranged by categories, as established in international or regional instruments. It was also suggested that consideration should be given to including the rule of specialty either in article 8 or elsewhere in the draft.

38. This provision was identified as one that should as far as possible be harmonized with the corresponding provisions of the draft statute. Attention was drawn in this context to the divergence between the current text and article 41 of the draft statute regarding the question of the admissibility of trials in absentia.

39. Like article 8, article 9 was identified as one that should, as far as possible, be harmonized with the corresponding provisions of the draft statute.

40. The reference to ordinary crimes, in paragraph 2 (a), was deemed to be connected to the characterization of conduct as a crime under national law, as opposed to its characterization at the international level. The view was expressed in this connection that, since the characterization of conduct under internal law should not be an obstacle to prosecution at the international level, the non bis in idem principle should not be invoked.

41. The problem of fake trials was characterized as a real one which could not be solved by encouraging a multiplicity of trials. The proposed provision concerning "sham" trials in a national court was seriously questioned as a derogation from the principle of territorial sovereignty and as a source of problems because the references to ordinary crimes and fake trials themselves raised some complicated questions.

42. At a more general level, concern was expressed that the application of the principle of non bis in idem in the context of the draft Code raised a number of important questions that required further consideration. First, should a trial in one court prevent trial in another court? Secondly, should a trial in a national court be a bar to trial at an international court? In this connection one representative, after recalling that the solution proposed by the Special Rapporteur in paragraphs 3 and 4 of the article adopted on first reading had elicited very nearly irreconcilable reactions from Governments, noted that the Special Rapporteur had stated categorically only that a national court was not competent to hear a case already tried by the international criminal court, a view shared by his delegation, not so much because it believed that allowing a national court to hear such a case could destroy the authority of the international court, but because it considered it desirable to encourage and consolidate the possibility of establishing an international criminal court. The same representative added that, in any case, courts at the national level should continue to exercise their jurisdiction until such time as the international criminal court had become fully recognized and effective.

43. Other comments included: (1) that a second trial was only a theoretical possibility, unless it were to take the form of a trial in absentia, a procedure contrary to the concept of respect for the rights of the accused; (2) that the principle of retrials should in any case be closely analysed, with proper respect accorded to all legal systems and ideas of justice, irrespective of the cultural, religious and social backgrounds they represented; and (3) that paragraph 3 seemed to single out imprisonment as the only valid form of punishment, rather than envisioning other possibilities such as community work, and that the question of penalties required careful consideration.

44. The principle of non-retroactivity contained in article 10 met with approval in the light of the considerations set forth in paragraph 166 of the Commission's report. This article too was identified as one that should as far as possible be harmonized with the corresponding provisions of the draft statute.

45. With reference to articles 11 to 14, the view was expressed that any available defences and relevant extenuating circumstances should be specified in the Code and not left to the discretion of the judges and that aggravating circumstances should also be provided for. It was noted that articles 11, 12 and 13 had no exact counterpart in the draft statute for an international criminal court or in the statute of the International Tribunal for the former Yugoslavia. One representative suggested grouping together the relevant factors mentioned in those articles or, alternatively, specifying the scope and manner in which each could be invoked in the commentary.

46. It was considered preferable to reformulate article 11 (on order of a Government or a superior) along the lines of principle IV of the Nürnberg Principles, so that it would read: "The fact an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility under international law, provided a moral choice was in fact possible for him." Another suggestion was to model the article on the relevant provision of the statute of the International Tribunal for the former Yugoslavia, under which the order of a superior was treated as a mitigating circumstance which did not confer total exemption from punishment.

47. The remark was made that article 12, which set forth the principle of the responsibility of the superior, was based on principle III of the Nürnberg Principles and should remain as it was. It was pointed out on the other hand that the current text was at variance with the corresponding provision of the statute of the International Tribunal for the former Yugoslavia. Attention was drawn in this context to the fact that the statute provided for the test of knowledge or reason to know as grounds for fixing responsibility of the superior and used the term "reasonable" to qualify the measures to be taken to prevent or repress the crime. The Commission was therefore encouraged to provide uniform guidance in specifying what tests were involved.

48. With respect to article 13, it was pointed out that, in the view of some Governments, the offender's status as head of Government should actually be regarded as an aggravating circumstance. Emphasis was placed on the need to harmonize the concepts involved and also to specify the exact consequences for the head of State when crimes on behalf of a State were involved or when they were committed in his or her name. In this regard, the view was expressed that the head of State should be able to show, by way of defence, or as extenuating circumstances, that clear instructions had been issued to prevent the commission of the crime and that they were supported by effective machinery to enforce them. It was further suggested that circumstances rendering the head of State's authority purely notional could also be an extenuating factor.

49. As regards article 14, the view was expressed that defences and extenuating circumstances should be addressed separately. In terms of defences, there was a suggestion that the Commission consider adding to article 14 the elements mentioned in paragraph 159 (a), (b) and (c) of the Special Rapporteur's report 4/ and possibly other defences, such as insanity, mistake, etc. However, the view was also expressed that the provision should be limited to self-defence, excluding the notions of coercion and state of necessity.

50. The provision was identified as one that would require harmonization with article 46 of the draft statute, which referred to similar circumstances only for purposes of punishment, and the view was expressed that some of the defences listed might be treated as mitigating circumstances rather than regarded as absolving the offender from criminal responsibility.

4/ A/CN.4/460 and Corr.1.

51. Other comments included: (1) that the phrase "the competent court" in article 14 could refer either to a national or to an international court, and that the matter was not clarified in the proposed new article 15; and (2) that a national court, if competent, should impose punishment commensurate with the extreme gravity of the crimes.

52. As regards the proposed new article 15, the view was expressed that there was room for further clarification of the factors involved in determining the extenuating circumstances on the basis of national practice and criminal law doctrine.

53. Articles 21 and 22 were viewed as illustrations of the very useful work that had been done on the draft Code.